U.S.
2011 9 - 2010

No. 09-978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP MORRIS USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

For more than a half century, respondents have engaged in a scheme to defraud the American public about the addictiveness and dangerous health effects of smoking. In the face of RICO violations of historic proportions, the government invoked RICO's broad grant of equitable authority to "prevent and restrain" racketeering activity. 18 U.S.C. 1964(a). The government sought equitable remedies that would deprive respondents of their ill-gotten gains and that would establish smoking-cessation and public-education programs to directly counter the continuing effects of respondents' fraud. Yet the court of appeals held these forms of relief entirely barred. That holding contradicts this Court's longstanding expansive construction of the authority of a court of equity; it conflicts with the holdings of other courts of appeals; and it seriously and improperly restricts RICO remedies. Pet. 13-26.

Respondents' opposition to certiorari consists of reiterating the flawed reasoning of the court of appeals; implying that this case is no different from the government's interlocutory certiorari filed five years ago; suggesting that the RICO remedy issues presented here are unimportant, academic, or unique; and, if all else fails, asserting that remedial issues in the context of this case have been superseded by legislation. None of those arguments provides a reason to deny review. The court of appeals' decision departs from this Court's governing standards for measuring the equitable powers of federal courts; it creates a conflict in the circuits (as the court below explicitly recognized); and it involves an issue of surpassing and continuing importance to RICO generally and to the district court's power to grant full relief in this case. Accordingly, this Court's review is warranted.

A. The Court Of Appeals Erroneously Truncated RICO's Equitable Remedies

1. The court of appeals held that Section 1964(a) provides only for "forward-looking remedies," which it interpreted to exclude disgorgement of ill-gotten gains, Pet. App. 113a, as well as remedies designed to "deny [respondents] the continuing future profits flowing from their past misconduct," *id.* at 92a. Respondents defend these rulings as justified by RICO's text and structure, as well as this Court's precedent, but their arguments fail to address the government's central reasons for disagreeing with the court of appeals.

"When Congress entrusts to an equity court the enforcement of [statutory] prohibitions," it invokes "the historic power of equity to provide complete relief," *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960), unless Congress provides "a clear and valid legisla-

tive command" that expressly or through "a necessary and inescapable inference" limits the "comprehensiveness" of such authority. *Id.* at 291 (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Under that analysis, RICO's broad grant of equitable jurisdiction to "prevent and restrain" violations authorizes the judiciary to remedy the ongoing effects of racketeering and "to divest [a RICO] association of the fruits of its ill-gotten gains," *United States* v. *Turkette*, 452 U.S. 576, 585 (1981).

Respondents suggest that RICO's text confers power only to "'forestall' and 'hold back'" future RICO violations. Joint Br. in Opp. 11 (Opp.). But nothing in Section 1964 refers to "future" violations. And respondents' reading would render the word "restrain" superfluous by giving courts the authority only to "prevent" future violations. The term "restrain" embraces the authority to "limit the force" or "effect" of RICO violations. Pet. 19 (quoting definitions). RICO's plain text thus permits courts to directly target the ongoing effects of past statutory violations. Respondents, by ignoring the meaning of "restrain," "violate the canon of construction requiring courts to 'give effect to every word of a statute whenever possible.'" Opp. 11 (quoting *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 (2004)).

Respondents offer two structural arguments (Opp. 11-12, 16-17) to limit RICO to the prevention of future violations. Each is flawed. First, respondents rely on the specific orders listed in Section 1964(a), which they claim authorize only the prevention of future violations. Section 1964(a), however, authorizes appropriate equitable orders "including, but not limited to" three specific categories of orders. Even if the listed orders did not reach past violations, that would not meet *Porter*'s standard of "a necessary and inescapable inference" limiting the otherwise broad power to "prevent and restrain" violations. Section 1964(a)

expressly states only that the listed categories are "includ-[ed]" within that broad power, not that they somehow limit it. Pet. 22-23. In any event, the specific categories themselves authorize redressing of the ongoing effects of past violations. Pet. 21-22.

Second, respondents rely on the availability of criminal forfeiture punishments and private treble damages actions under RICO (Opp. 16-17). But those punitive and compensatory provisions say nothing that suggests—much less creates "a necessary and inescapable inference"—that Congress restricted the judiciary's equitable power under Section 1964(a) to preventing future RICO violations. As the petition explains (Pet. 24-25), equitable relief redressing the ongoing effects of respondents' racketeering violations can take the form of requiring educational and smoker-cessation programs, which bear no resemblance to the monetary penalties respondents cite. And disgorgement of ill-gotten gains to prevent unjust enrichment is altogether different in scope and function from forfeiture or private damages. Furthermore, in RICO, Congress specifically intended to provide overlapping means of relief through an enhanced "combination" of civil and criminal remedies. *Ibid.* Respondents would turn that intention on its head by treating the remedies as mutually exclusive.

This Court's decisions in *Porter* and *Mitchell* confirm that Congress's grant of authority to "prevent and restrain" violations of RICO encompasses the relief sought in this case. Both *Porter* and *Mitchell* involved statutory schemes that, like RICO, provided overlapping equitable and other civil relief and criminal penalties. Yet this Court upheld the authority of an equity court to grant relief necessary to undo the effects of past wrongdoing. Pet. 17, 23-25.

Respondents suggest (Opp. 19) that a specific statutory phrase ("other order") underlies *Porter*'s conclusion that

Congress authorized equitable disgorgement of ill-gotten gains. But *Mitchell* expressly concluded that this "language of the statute" did not control *Porter*'s holding. 361 U.S. at 291-292. And contrary to respondents' assertion (Opp. 19), *Porter* found disgorgement to be "consistent with and [to] differ[] greatly from" the "damages and penalties" that were also authorized for a reason that similarly differentiates the equitable remedies under RICO sought here from damages or other penalties: the equitable relief sought furthers "the public interest by restoring the status quo." *Porter*, 328 U.S. at 402.

Respondents also fail to distinguish *Mitchell*'s holding that a court's authority to "restrain violations" of the Fair Labor Standards Act (FLSA) includes authority to order repayment of unlawful gains. Pet. 16-17. To the extent that the FLSA was "silent" on whether to restrict the "historic power of equity," Opp. 20, so is RICO. The FLSA, like RICO, grants equitable authority to "restrain" violations and allows other forms of overlapping relief. Pet. 24. Congress enacted RICO in 1970 against the background of *Mitchell* and *Porter*, and it is presumed to have legislated with those structurally and linguistically parallel precedents in mind. Pet. 17.

Respondents' reliance (Opp. 21-23) on *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996), which the Court decided well after Congress enacted RICO, is misplaced. *Meghrig* nowhere limited *Porter* and *Mitchell* and, instead, confronted a statute with a comprehensive remedial structure whose very details would be "wholly irrational" if the statute were to permit monetary compensation for past cleanup efforts. *Id.* at 486. Nothing in RICO similarly provides "a necessary and inescapable inference" that Congress intended to confer equitable relief targeting only future racketeering violations. Pet. 25-26.

2. Respondents do not attempt to defend the panel's rationale for distinguishing RICO from the antitrust context. Cf. Pet. 20 n.6. They instead argue (Opp. 14-15) that statutory authority to "prevent and restrain" antitrust violations does not permit so-called "backward-looking" relief. But under the principles described above, the antitrust laws do authorize courts to remedy the ongoing effects of past violations and to require disgorgement of unlawful gains. This Court's rejection of an *implied* private action for contribution, see Opp. 14 (citing *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981)), does not restrict *express* governmental actions to "prevent and restrain" violations—as under the antitrust laws and RICO.

Respondents incorrectly contend (Opp. 15) that the Court did not approve "backward-looking remed[ies]" in *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972). *Ford* affirmed, in addition to divestiture, what respondents would deem "backward-looking" relief to "cure the ill effects of the illegal conduct." *Id.* at 575 (citation omitted). The Court specifically upheld relief prohibiting Ford's otherwise lawful manufacture of spark plugs and use of its name on plugs produced by others in order to "correct for Ford's illegal acquisition" of a business and facilitate the "restoration of the *status quo ante*," *i.e.*, the pre-violation "competitive structure of the market." *Id.* at 575-576 & n.10, 578. Thus, under the antitrust laws, courts not only "put 'an end to'" unlawful, anti-competitive conduct, but "deprive 'the antitrust defendants of the benefits of their [violations].'" *International Boxing Club* v. *United States*, 358 U.S. 242, 253 (1959) (citation omitted).

Respondents (Opp. 15) misleadingly suggest that the government in the *Microsoft* litigation asserted that courts cannot order "disgorgement of illegal profits." The gov-

ernment did not request equitable disgorgement in *Microsoft*, where the record did not reveal any unlawful profits or otherwise support disgorgement. Cf. 67 Fed. Reg. 12,134 (2002). The government explained that the consent-decree remedies "in [that] case" sought to enjoin unlawful conduct, to prevent future violations, *and* to "restore competitive conditions in the market affected by Microsoft's unlawful conduct." *Id.* at 12,135. The government never suggested that equitable disgorgement would be unavailable in an appropriate case; it noted only that "[m]onetary damages * * * are not available" in a Sherman Act case brought under 15 U.S.C. 4. 67 Fed. Reg. at 12,135.

3. Respondents' suggestion (Opp. 29-30; BATCo Opp. 13-14) that disgorgement and restitution constitute legal, rather than equitable, relief when not traced to a particular res was not the basis of the court of appeals' decision, and it is wrong. Respondents conflate the equitable remedies of "constructive trust" and "equitable lien" (which must target a specific res) with other forms of restitution available at equity (which do not). See *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213-214 & n.2 (2002) (noting that equitable restitution does not always require "identify[ing] a particular res"); see also *Williams Elecs. Games, Inc.* v. *Garrity*, 366 F.3d 569, 577-578 (7th Cir. 2004) (discussing *Great-West*); *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (equitable disgorgement requires payment of "a sum equal to the amount wrongfully obtained" and is not limited to "replevy [of] a specific asset"). *Porter* itself makes clear that a court's "inherent equitable powers" include decrees to "disgorge profits" unlawfully gained, 328 U.S. at 398-399; *id.* at 400; *Mitchell* confirms that "the historic power of equity to provide complete relief in light of the statutory purposes" includes reimbursement for lost wages resulting from statutory

violation, 361 U.S. at 292; and neither decision indicates any need to trace disgorged funds to a particular res.

Porter also confirms that the deterrent effect of "disgorg[ing] profits" that have been illegally gained serves a crucial forward-looking function by promoting "[f]uture compliance" with statutory proscriptions. 328 U.S. at 398, 400; see Pet. 23 n.7. Contrary to respondents' contention (Opp. 30), *Tull* v. *United States*, 481 U.S. 412, 423 (1987), does not hold that any monetary remedy that promotes deterrence is "legal in nature." Rather, *Tull* makes clear that divesting a violator of "profits gained from violations of the statute" is an "equitable determination," *id.* at 422, and noted that "disgorgement of improper profits [is] traditionally considered an equitable remedy," *id.* at 424.

Finally, respondents err in suggesting (Opp. 29-30; BATCo Opp. 14) that disgorgement cannot be restitutionary (and equitable) unless it is paid directly to respondents' victims rather than the government. Numerous courts have held otherwise. See, *e.g.*, *SEC* v. *Commonwealth Chem. Sec. Inc.*, 574 F.2d 90, 95 (2d Cir. 1978); see also *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 468-470 (11th Cir. 1996); *SEC* v. *Blavin*, 760 F.2d 706, 712-713 (6th Cir. 1985). And the ultimate distribution of funds disgorged in equity is subject to a court's equitable discretion. See, *e.g.*, *SEC* v. *First Pac. Bancorp*, 142 F.3d 1186, 1192 (9th Cir. 1998), cert. denied, 525 U.S. 1121 (1999); *SEC* v. *Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). Respondents' other contentions regarding the potential size and source of a disgorgement award in this case (Opp. 30-31; BATCo Opp. 14-15) are entirely premature. The government has not had the opportunity to present its full case for disgorgement and other relief targeting the ongoing effects of respondents' scheme to defraud, and the district court has yet to exercise its equitable discretion in resolving respondents'

concerns. The question presented here is simply whether any such relief is ever available under Section 1964(a).

B. This Court Should Review The Court Of Appeals' Erroneous Construction Of RICO

1. Respondents argue (Opp. 2, 28-29) that this case is less worthy of review than it was in 2005, when the Court denied the government's interlocutory petition for a writ of certiorari. Yet in 2005, respondents argued that interlocutory review "to decide the theoretical availability of one potential remedy—disgorgement—before the district court has decided liability or whether any of the other * * * remedies would be appropriate and sufficient" was "premature" and unjustified. 05-92 Br. in Opp. 9-10. Respondents asserted that "this Court has *never* taken an interlocutory appeal" in similar contexts. *Ibid.* But now, the district court has held a nine-month bench trial and resolved liability issues against respondents. At this point, there are now no pertinent issues that remain unresolved in the lower courts which might otherwise have counseled against review of the question presented.

2. All members of the panel that limited Section 1964(a) to the redress of future violations, and that barred *any* possibility of equitable disgorgement of ill-gotten gains, recognized that the court created a circuit conflict. Pet. App. 119a-120a (majority); *id.* at 129a (concurrence); *id.* at 134a (dissent). Respondents are mistaken in contending (Opp. 23-26; BATCo Opp. 15) that this case does not implicate the conflict with *United States* v. *Carson*, 52 F.3d 1173 (2d Cir. 1995), cert. denied, 516 U.S. 1122 (1996), and *Richard* v. *Hoechst Celanese Chemical Group, Inc.*, 355 F.3d 345 (5th Cir. 2003), cert. denied, 543 U.S. 917 (2004). *Carson* and *Richard* permit disgorgement under RICO, but limit it to ill-gotten gains that may be used to fund future

unlawful conduct. Although the government disputes this limitation (Pet. 26-27), it argued in the alternative in the district court and on appeal (and Judge Tatel agreed) that it was entitled to prove the propriety of disgorgement under those decisions. See, *e.g.*, 04-5252 Gov't C.A. Br. 30-32; Pet. App. 169a-170a, 173a-174a (Tatel, J., dissenting). Respondents themselves petitioned for an interlocutory appeal premised on their contention that *Carson* controls this case, *id.* at 137a-139a (Tatel, J., dissenting), and the court in 2005 left no doubt that it had rejected *Carson*. The court of appeals thus denied the government the opportunity to prove the factual foundation for such relief at trial, directly implicating the split with *Carson* and *Richard*.

3. Respondents assert (Opp. 26-27) that decisions applying the principles in *Porter* and *Mitchell* to construe similar grants of equitable authority authorizing disgorgement (see Pet. 27-28) have no bearing on the need for certiorari review. The Federal Food, Drug, and Cosmetic Act (FFDCA)—like RICO and the statute in *Mitchell*—authorizes courts to "restrain" statutory violations while also providing a wide range of other civil, criminal, and administrative remedies. The decisions construing those provisions in light of *Porter* and *Mitchell* to authorize equitable restitution and disgorgement (see Pet. 27-28) thus are directly relevant to the question presented. Respondents ignore the Tenth Circuit's express rejection of the D.C. Circuit's disgorgement analysis in this case in holding that the FFDCA authorizes disgorgement of ill gotten gains. Pet. 28. And respondents misleadingly distinguish (Opp. 26) the Securities Exchange Act from RICO by citing statutory text in 15 U.S.C. 78u(d)(5) that Congress added in 2002 *after* the relevant decision discussed in the petition, which construed the statute's more general authorization to "enjoin" violations. See Pet. 27.

4. Contrary to respondents' suggestion (Opp. 27-28, BATCo Opp. 8-9), the court of appeals' decision has significance well beyond the confines of this particular litigation. The government brings civil RICO enforcement actions where the public interest demands it, and it is most likely to seek equitable disgorgement where the racketeering activity is most widespread and profitable. This case represents the quintessential illustration of that practice. Moreover, because the court of appeals' decision is not limited to disgorgement, but applies to all forms of relief designed to rectify the continuing harms of prior violations, its principles would constrain the government's ability to obtain complete relief in other civil RICO enforcement actions, as it will prevent courts from vindicating the public interest by "cur[ing] the ill effects of the illegal conduct." *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88-89 (1950).

Nothing in recent legislation affects this case. While "legal sale of cigarettes is expressly contemplated by federal law," Opp. 13, that does not immunize RICO violations or divest courts of their equitable powers. Pet. 31 n.8. And if equitable relief to redress the ongoing effects of illegal conduct and to force disgorgement of ill-gotten gains is ever appropriate, it is appropriate here. Respondents' sophisticated scheme to defraud has cost the lives and damaged the heath of untold millions of Americans—all in respondents' pursuit of profits. A court of equity must be able to carry out the powers that Congress has expressly authorized, to prevent that unjust enrichment and to restrain respondents from continuing to profit from their wrongs.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2010